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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-5231

CHARLES EDWARD PAYNE,
Petitioner

— VS —

FRANK D. LOWERY,
AS WARDEN, DRAPER PRISON,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX

	Page
QUESTION PRESENTED	1
ARGUMENT	1
CONCLUSION	5
APPENDIX "A" — Return and Answer	7
APPENDIX "B" — Opinion	10

CITATIONS

Cases: Page

Bowlen v. Scafati, 395 F.2d 692 4

Harris v. Ellis, 204 F.2d 685 4

Jones v. Warden, Louisiana State Penitentiary, 402 F.2d 776 4

Nowakowski v. Maroney, 386 U.S. 542, 18 L. Ed.2d 282, 87 S. Ct. 1197 ..... 2, 4

Payne v. Alabama, ——— U. S. ———, 34 L. Ed.2d 669 3

Payne v. Alabama, 48 Ala. App. 401, 265 So.2d 185 3

Payne v. Alabama, 288 Ala. 748, 265 So.2d 192 3

Stewart v. Beto, 454 F.2d 268 4

Strode v. Mississippi, 456 F.2d 1295 4

In re Woods, 249 F.2d 614, art. den. 356 U.S. 921, 2 L. Ed.2d 716, 78 S. Ct. 705 ..... 4, 5

Articles:

Blackmun, *Allowance of In Forma Pauperis Appeals in Section 2255 and Habeas Corpus Cases*, 43 F.R.D. 343 5

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QUESTION PRESENTED

MAY A CIRCUIT JUDGE REFUSE TO GRANT AN APPLICATION FOR A CERTIFICATE OF PROBABLE CAUSE WHERE SUCH JUDGE HAS NOT HELD AN EVIDENTIARY HEARING OR EXAMINED THE TRIAL RECORD?

ARGUMENT

Petitioner comes before this Honorable Court pursuant to a Petition For Writ of Certiorari to the United States

Court of Appeals For the Fifth Circuit. Petitioner's complaint arises out of the refusal of the Honorable Joe Ingraham, as Judge of the Fifth Circuit Court of Appeals, to issue to Petitioner a Certificate of Probable Cause (Petitioner's Appendix "A", p. 18) to enable him to appeal the denial of his Writ of Habeas Corpus by the United States District Court, Northern District of Alabama, Northeastern Division. (Petitioner's Appendix "A", p. 9).

It is noted that the District Court refused to grant a Certificate of Probable Cause (Petitioner's Appendix "A", p. 12). Such refusal should be accorded weighty consideration by a circuit judge. *Nowakowski v. Maroney*, 386 U.S. 542, 18 L. Ed. 2d 282, 87 S. Ct. 1197. In his order denying Petitioner's Motion for a Certificate of Probable Cause, United States District Judge C. W. Allgood stated that ". . . there are no legal issues which are likely to be decided in favor of Petitioner on appeal." Petitioner contends that this determination should not be given the "weighty consideration" referred to by this Honorable Court in *Nowakowski*, supra, due to the fact that the District Court did not hold an evidentiary hearing on the matter nor refer to the trial record.

In his Petition For Writ of Habeas Corpus, the Petitioner contended that he had been denied due process of law by the refusal of the trial court to grant a motion for a change of venue based on pretrial publicity, and by the refusal of the trial court to grant a continuance to permit Petitioner's counsel to study a psychiatric report. It is submitted by the State of Alabama that the granting or denial of such motions is within the sound discretion of the trial court. It is further submitted that District Judge Allgood was correct in his finding that there were no legal issues presented by Petitioner

which were likely to be resolved in Petitioner's favor on appeal. The United States Magistrate's Report (Petitioner's Appendix "A", pp 7-8), which was adopted by the District Court (Petitioner's Appendix "A", p. 9), reflects the fact that the Petition For Writ of Habeas Corpus (Petitioner's Appendix "A", pp 3-5), the State of Alabama's Return and Answer (Respondent's Appendix "A", p. 7) under the District Court's Order to Show Cause (Petitioner's Appendix "A", p. 6), and the reported opinions of the Alabama Court of Criminal Appeals (Respondent's Appendix "B", p. 10) were examined. These documents reflected no abuse of discretion on the part of the trial court.

Subsequent to the District Court's denial of Petitioner's Writ of Habeas Corpus and of his Motion for a Certificate of Probable Cause (Petitioner's Appendix "A", pp. 10-11), the Petitioner applied to the Fifth Circuit Court of Appeals for a Certificate of Probable Cause (Petitioner's Appendix "A", pp. 13-17). Circuit Judge Joe Ingram had access to the application to the Circuit Court for a Certificate of Probable Cause, the Petition for Habeas Corpus, the State of Alabama's Return and Answer on the Order to Show Cause, the Order of the District Court denying the Writ of Habeas Corpus, the Application for a Certificate of Probable Cause filed in the District Court, the Order denying the Certificate of Probable Cause, and the reported opinion of the Alabama Court of Criminal Appeals (*Payne v. Ala.*, 48 Ala. App. 401, 265 So. 2d 185) which both the Alabama Supreme Court and the United States Supreme Court refused to review or modify (*Payne v. Ala.*, 288 Ala. 748, 265 So.2d 185; ——— U.S. ———, 34 L. ed.2d 669). The State of Alabama would respectfully submit that, under the circumstances of this case, there was no need for either the Circuit Court or the District Court to hold an evidentiary hearing or to have the entire

record of the trial court before them. Such a method was utilized by the Ninth Circuit in the case of *In Re Woods*, 249 F.2d 614, cert. denied 356 U.S. 921, 2 L. ed.2d 716, 78 S. Ct. 705, which is cited in *Nowakowski*, supra. The United States Court of Appeals for the Fifth Circuit has stated that a Certificate of Probable Cause is not issued as a matter of right, *Jones v. Warden, Louisiana State Penitentiary*, 402 F.2d 776, nor is there any policy in favor of the issuance of such a certificate. *Strode v. Mississippi*, 456 F.2d 1295. The Fifth Circuit has equated "probable cause" to a substantial showing of the denial of a federal right. *Harris v. Ellis*, 204 F.2d 685; *Stewart v. Beto*, 454 F.2d 268. Respondent would respectfully contend that there was no denial of a federal right, nor was there a "substantial showing" of any such denial and, thus, the Circuit Court was correct in overruling Petitioner's Motion for a Certificate of Probable Cause.

When a District Court denies a certificate of probable cause, the burden is on the appellant to make a substantial showing to the Circuit Court that he has been denied a federal right. *Bowlen v. Scafati*, 395 F.2d 692. It is noted that at no time did Petitioner, who has been ably represented by counsel throughout these proceedings, request a transcript be furnished either the District Court or the Circuit Court. Even had such a transcript been necessary to the determination of the cause, Petitioner would be placed in the position of having failed to carry his burden and then complaining when that burden was not carried by the Respondent or by the courts.

While both a district judge and a circuit judge have the power to call for and consider a state court record, this power should not be exercised where, as in the case of *In re*

Woods, supra, the judge can determine from another source whether or not there is a substantial showing that a federal right has been denied. (See Blackmun, Allowance of In Forma Pauperis Appeals in Section 2255 and Habeas Corpus Cases, 43 F.R.D. 343.)

CONCLUSION

For the foregoing reasons it is respectfully submitted that the instant Petition For Writ of Certiorari is due to be denied.

Respectfully submitted,

WILLIAM J. BAXLEY
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DAVID W. CLARK
Assistant Attorney General
Of Alabama

GEORGE M. VAN TASSEL, JR.
Assistant Attorney General
Of Alabama

ATTORNEYS FOR RESPONDENT

ADDRESS:

250 Administrative Building
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CERTIFICATE OF SERVICE

I, David W. Clark, one of the Attorneys For Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 31st day of AUGUST, 1973, I served copies of the foregoing Brief in Opposition of Respondent on Honorable Fred Blanton, Jr. by placing said copies in the mail, postage prepaid, and properly addressed to said attorney of record, as follows:

Honorable Fred Blanton, Jr.
Attorney at Law
Twenty-One Twenty-One Building
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Birmingham, Alabama 35203

DAVID W. CLARK
Assistant Attorney General
Of Alabama

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CHARLES EDWARD PAYNE, PETITIONER	))	
—VS—	)	NO. CA 73-239-NE
FRANK D. LOWERY, as Warden Draper Prison, Elmore, Alabama, RESPONDENT	))))	

RETURN AND ANSWER AND, IN THE ALTERNATIVE, MOTION TO DISMISS

Comes now the Respondent, State of Alabama, by and through the Attorney General of Alabama, and in response to the Order to Show Cause issued by this Honorable Court on to-wit, March 14, 1973, submits the following:

1. For that Petitioner was not denied his right to due process because of the refusal of the trial court to grant his Motion For Change of Venue. Petitioner would argue that his rights were denied due to the fact that no definitive legal standards are applied to a Motion For A Change of Venue. The Respondent would respectfully contend that the application of any such rigid standards is patently im-

possible due to the very nature of the motion itself. A decision on a motion of this type must, of necessity, be reached through a balancing process.

2. For that a decision on a Motion For Change of Venue involves a determination on the part of the trial judge as to whether a fair and impartial jury can be obtained in the locality where the crime was committed. In order to make this determination, the trial court must look to the circumstances surrounding the case and decide whether these circumstances would so prejudice the people of that locality that a fair and impartial jury could not reasonably be expected to be obtained. In reaching a determination on an issue of this sort, the application of standards or yardsticks is useless. For example, who is to say how many newspaper articles it would take to prejudice the defendant in the minds of the public? What possible standards could be evolved which would determine whether the contents of such articles would, in fact, prejudice the defendant? It is for these very reasons that it has long been held that the grant or refusal of a change of venue is within the sound discretion of the trial court. 33 ALR3rd. 42, 43.

3. For that Petitioner's claim that he was denied the right to adequate representation of counsel through the trial court's refusal to grant a continuance for study of an insanity defense is without merit. Without even getting to Petitioner's argument that he was prejudiced because the denial in question was not predicated upon any definitive legal standards, it is apparent that, in the instant case, no injury was done to Petitioner's cause.

4. For that the record of the case discloses that Petitioner's Motion For Continuance was based upon the con-

tention that Petitioner's attorneys had not had sufficient time to examine a certain psychiatric report. The report was received by Petitioner's attorneys on October 19, 1972 and the trial date had been set for November 13, 1967. The Motion For Continuance was filed on October 20, 1972. Thus, there was a period of twenty-five days between the receipt of the report and the date set for trial. (See *Payne v. Alabama*, 48 Ala. App. 401, 265 So.2d 185.) This was clearly an adequate amount of time to evaluate the report and the trial judge properly exercised his discretion in overruling Petitioner's motion. *Forest Investment Corp. v. Commercial Credit Corp*, 271 Ala. 8, 122 So.2d 131.

WHEREFORE, THE PREMISES CONSIDERED, Respondent prays that this Court will consider the foregoing and determine that good cause has been shown why Petitioner is not entitled to a Writ of Habeas Corpus and grant this Motion to Dismiss.

Respectfully submitted,

WILLIAM J. BAXLEY
Attorney General

GEORGE M. VAN TASSEL, JR.
Assistant Attorney General
ATTORNEYS FOR RESPONDENT

ADDRESS:
250 Administrative Building
Montgomery, Alabama 36104

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Return and Answer on Hon. Fred Blanton, Jr., Attorney for Petitioner, by placing said copy in the mail, postage prepaid, and properly addressed to him at: 2121 Building, Birmingham, Alabama 35203, on this the 2nd day of APRIL, 1973.

GEORGE M. VAN TASSEL, JR.
Of Counsel

APPENDIX "B"

FEB 8 1972

THE STATE OF ALABAMA — JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS
OCTOBER TERM, 1971-72

8 Div. 38

Charles Edward Payne
v.
State
Appeal from Madison Circuit Court

ALMON, JUDGE

This is an appeal from a judgment of conviction of murder in the first degree. The jury fixed the punishment at life imprisonment.

The State's evidence tended to show that on the night of May 16, 1967, the appellant was in the American Legion

Hut on Triana Boulevard in Huntsville where drinks were being served. He was intoxicated and boisterous. John P. Wise, a part-time manager-bartender in the establishment, was present. One of Wise's apparent duties was to keep the peace and quiet, or in common parlance, served as "bouncer." During the course of the evening Wise and appellant were involved in several minor altercations, which ended with appellant's being escorted out of the club by Wise. Shortly thereafter, someone reported some difficulty in the parking lot in front of the club and Wise went out to investigate. He returned and then when another similar report was made to Wise, he again went outside. Shortly after Wise left on this occasion, one customer who was standing at the bar started out the front door but was pulled back by someone who said, "Don't go out there now." This witness testified that while the front door was opened briefly he saw Wise and the appellant standing in the parking lot talking. A few minutes later three shots or "booms" were heard by the people inside and shortly thereafter Wise's body was found in the middle of the street in front of the club. He had been killed by three blasts from a shotgun. When his body was discovered, the appellant was not at the scene.

No one saw the shooting but a taxi driver testified that on the night in question he picked the appellant up in front of the American Legion Hut and as he started to pull off, the appellant told him to stop and got out. The appellant then walked over to what appeared to be a 1957 Chevrolet, opened the trunk, and took out what the taxi driver thought was a rifle. Two men then emerged from the front door of the club, one in front of the other. The first man got into the cab and asked to be taken downtown. The other, who was about Wise's size, addressed himself to the appellant

and said, "Put that up before the law gets here." The taxi driver then pulled off and when he was about a block away he heard what sounded like two rifle shots. On returning from downtown, the taxi driver observed a crowd in front of the club, saw an ambulance, and Wise's covered body.

After the police arrived and had begun securing the scene, two automobiles, one driven by an off-duty police officer and the other driven by appellant, were involved in a head-on collision on Triana Boulevard, directly in front of the American Legion Hut. Several witnesses identified the appellant as the possible killer and he was arrested. A Remington automatic .12 guage shotgun was observed lying on the back seat of appellant's automobile, a 1956 Chevrolet. There was some testimony that the appellant grabbed the shotgun immediately after the accident and that the arresting officers took it away from him. Three .12 gauge shells were removed from the gun and four .12 gauge shells were found on the appellant when he was searched. Three Winchester Super X Mark 5, .12 gauge Naught Buck shotgun shell hulls were found lying near the body.

A state toxicologist was qualified as an expert in firearms identification. Based on microscopic comparisons of those shell hulls found at the body and others fired from the appellant's gun, it was his opinion that the three shells found at the scene were fired from the shotgun found in appellant's possession. It was also his opinion that the shots were fired from a distance of about fifteen feet.

The corpus delicti in a homicide prosecution, and evidence sufficient for a conviction for the crime of murder, may be established through circumstantial evidence. *Brooks v. State*, 248 Ala. 628, 29 So.2d 4; *Rowe v. State*, 243 Ala.

618, 11 So.2d 749; *McDowell v. State*, 238 Ala. 101, 189 So. 183. Such circumstantial evidence is sufficient if its effect on the jury's mind is to produce a conviction of the guilt of the accused beyond a reasonable doubt. *Hall v. State*, 40 Ala. 698; *Brooks v. State*, supra; *Coleman v. State*, 276 Ala. 513, 164 So.2d 704, reversed 377 U.S. 129, 84 S. Ct. 1152, 12 L. Ed. 2d 190 (on other grounds). We have carefully examined the evidence and are convinced that it was sufficient to take the case to the jury and warrant the verdict returned.

The appellant argues that there should be a reversal of the case because of a denial of his motion for a change of venue. The basis of this motion was that appellant's family had a reputation for crimes of violence in Madison County and that newspaper coverage of the crime had been such that the appellant could not receive a fair and impartial trial.

In support of this motion, the appellant introduced several newspaper articles from the local papers concerning the event and other articles ranging back over a period of fifteen to twenty years which dealt with crimes other members of appellant's family had been involved in. The appellant also introduced the criminal records of ten members of appellant's family and the affidavits of twenty-eight people who stated that they did not believe the appellant could receive a fair trial in Madison County. Of these twenty-eight affiants, most were from the appellant's rural community and all were personal acquaintances.

In rebuttal, the State subpoenaed several witnesses who had not talked to anyone about the case. These witnesses testified that they had either never heard of the appellant

or that they had read something about the case in the newspapers. Only one of these witnesses had ever heard of appellant's family and she did not associate the family name with violence. All felt the appellant could receive a fair trial in Madison County. The State also introduced evidence which tended to show that the appellant or his counsel had instigated at least some of the publicity by calling the local paper and requesting a photographer be present when the appellant was released on bail, and then making a special trip back to the courthouse and posing for the pictures.

Newspaper publicity does not necessarily constitute grounds for a change of venue. *Littlefield v. State*, 36 Ala. App. 507, 63 So.2d 565, cert. den. 258 Ala. 532, 63 So.2d 573; *Collins v. State*, 234 Ala. 197, 174 So. 296.

Whether a motion for a change of venue should be granted is a matter addressed to the sound discretion of the trial court and will not be disturbed except for gross abuse. *Littlefield*, supra; *Mathis v. State*, 280 Ala. 16, 189 So.2d 564, cert. den. 386 U.S. 935, 87 S. Ct. 963, 17 L. Ed.2d; *Cobern v. State*, 273 Ala. 547, 142 So.2d 869. And the mere belief of the appellant or of his witnesses that he cannot receive an impartial trial is insufficient to entitled him to a change of venue. *Patton v. State*, 246 Ala. 639, 21 So.2d 844; *Lee v. State*, 246 Ala. 343, 20 So.2d 471; *Mathis*, supra. The burden of showing this to the reasonable satisfaction of the court is on the appellant. *Mathis*, supra; *Tiner v. State*, 271 Ala. 254, 122 So.2d 738; *Boutwell v. State*, 279 Ala. 176, 183 So.2d 774. After a careful examination of the record before us, we do not think appellant met that burden. We hold, therefore, that the motion for a change of venue was properly denied.

Appellant's motion for a continuance was overruled. The basis for this motion was that the attorneys for appellant had insufficient time to evaluate a psychiatrist's report and prepare an adequate defense.

According to the allegations of the motion, this written report was given to defense counsel on October 19, 1967, after some four months of observation of the appellant by the psychiatrist. The motion for continuance was made the following day. This was some twenty-five days before trial of the case on November 13, 1967.

It is settled law that the matter of the granting or refusing of a motion for continuance is largely within the sound discretion of the trial court and the exercise of such discretion will not be disturbed except for gross abuse. See 6A Ala. Dig., Criminal Law, Key 586. We find no error in the denial of this motion.

The trial judge refused to give the jury several written requested charges on the law of self-defense. One witness, who was sitting at the table in the American Legion Hut, testified that he saw the deceased walking toward the front door and that to the best of his knowledge the deceased was carrying a billy club. Then three or four minutes later the witness heard shots. This was all the evidence with reference to appellant's claim of self-defense.

Appellant was not in his home or other place in which he was relieved of any duty to retreat. The evidence tended to show that he had every opportunity to leave the scene, but instead waited outside until the deceased came out of the night club. *Teague v. State*, 120 Ala. 307, 25 So. 209.

In the absence of evidence tending to show both that the

appellant was in actual or apparent imminent peril and that he was unable to retreat, it is assumed that he was not in such peril and that he was able to retreat. It necessarily follows that the accused has the burden of producing evidence warranting both of such findings and that the discharge of that burden is one of the conditions precedent to his being entitled to having his claim of self-defense submitted to the jury. *Naugher v. State*, 105 Ala. 26, 17 So. 24; *Cosby v. State*, 269 Ala. 501, 114 So.2d 250. The trial judge was therefore correct in refusing to give these requested written charges.

Since appellant did not receive the death penalty, there is no merit in his claim of error on the part of the trial judge in qualifying the jury under the requirements of *Witherspoon v. Illinois*, 391 U.S. 510, 8 88. Ct. 1770, 20 L. Ed.2d 776. *Bumper v. North Carolina*, 391 U.S. 543, 88 S. Ct. 1788, 20 L. Ed.2d 797.

Defense counsel objected to the action of the trial court in allowing two state witnesses to make an in court identification of appellant because he was exhibited to these witnesses before trial for identification purposes without the aid of counsel.

The right to counsel as expressed in *U.S. v. Wade*, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed.2d 1149, and *Gilbert v. California*, 388 U.S. 263, 87 S. Ct. 1951, in 18 L. Ed.2d 1178, is not applicable to this case since the confrontation complained of occured on May 16, 1967, several days prior to June 12, 1967, the effective date of *Wade* and *Gilbert*. Thus, we are presented with a duty process question under *Stovall v. Denno*, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed.2d 1178.

One of the two witnesses, whose in court identification was sought to be excluded, testified that he was standing among the spectators near the deceased body when the automobile which the appellant was driving was involved in an accident immediately in front of the scene. This witness stated that he approached the appelant's automobile and told a police officer, "That's the fellow that was talking to John [the deceased]."

Obviously this spontaneous identification, without any prearrangement by police, would not preclude a subsequent in court identification.

The other witness whose testimony was sought to be suppressed was the taxi driver who identified the appellant as the man who got into, and then out of, his taxi in front of the American Legion Hut and then walked over to the trunk of an automobile and withdrew what appeared to be a rifle.

Around midnight this witness received a call from his dispatcher and was told to go to the police station. When he arrived he observed the appellant sitting at a desk with a detective. This was approximately one hour after the fatal shooting.

There is no prohibition against viewing a suspect alone particularly when this occurs near the time of the alleged criminal act. *Bates v. U.S.*, 405 F.2d 1104. *Russell v. U.S.*, 408 F.2d 1280 cert. denied, 395 U.S. 928, 89 S. Ct. 1786. We conclude that this confrontation was not so unnecessarily suggestive and conducive to mistaken identification as to deny appellant due process of law.

Finding no reversible error the judgment is due to be AFFIRMED.

PRICE, P. J.; CATES & TYSON, J. J., CONCUR.